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No. 85

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

Barbara Rittenhouse,
Petitioner,
vs.
DeKalb County, Georgia
and C. L. Stewart,
Respondents.

Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Gail C. Flake
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Attorneys for Respondents

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF CASE

A. Facts and Proceedings Below

The events giving rise to this complaint initiated during the evening of December 15, 1981, when a resident of the

City of Chamblee, Georgia, called the DeKalb County Water and Sewer Department's emergency telephone number to report a leaking water meter. The caller reported that water was flowing from the meter onto a nearby public road and might freeze if temperatures fell below freezing that evening. While the affidavits and depositions filed in the District Court raised some factual dispute as to whether the resident's call was promptly dispatched to the county's emergency night crew, there is no dispute that the county had no formal or written procedures for prioritizing emergency calls, and that county crews were occupied on other emergency calls during the evening of December 15th and prior to responding to the subject call. Water from the leaking meter did freeze on the road, and early the next morning a car driven by Karen Bullard skidded on the ice and

collided with petitioner's car. Petitioner sustained injuries, as well as damage to her vehicle. Ms. Bullard, along with two children in her car, were injuried, and a third child was killed.

Petitioner Rittenhouse, filed suit under §1983 against DeKalb County, the director of the county's water and sewer department (C. L. Stewart), and the City of Chamblee. Petitioner does not contend that director Stewart had any personal involvement in or knowledge of the incident prior to the time of the accident. Rather, petitioner's claim against DeKalb County and Stewart arises in negligence and alleges the accident resulted from respondents' failure to promptly repair the water leak and/or to formalize emergency repair priority procedures. Petitioner also sought to have the District Court exercise pendent jurisdiction over her state claims in negligence against Ms. Bullard.

B. The District Court's Decision

A copy of the District Court's order granting summary judgment to DeKalb County and C. L. Stewart has been attached to Ms. Rittenhouse's petition for writ of certiorari and is reported at 575 F.Supp. 1173 (N.D. Ga. 1983). The District Court found that petitioner had failed to establish an abuse of power on the part of the county defendants and that, at most, the complaint only set out a cause of action in negligence under Georgia tort law. Accordingly, the Court held petitioner's allegations against DeKalb County and Stewart did not rise to constitutional proportions sufficient to sustain a §1983 action. The court expressly found that DeKalb County and Stewart acted in good faith, and that their action did not constitute "an abuse of governmental power sufficient to raise an ordinary tort by a government agent to the stature of a violation of the Constitution."

Rittenhouse v. DeKalb County, 575 F.Supp. 1173, 1174, (N.D. Ga. 1983), citing Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980).

C. The Decision of the Eleventh Circuit Court of Appeals

Although the Circuit Court affirmed the District Court's grant of summary judgment in favor of the county and Stewart, its decision was premised upon a different theory. At the outset, the Eleventh Circuit stated that it had "no difficulty agreeing with the District Court that defendants' conduct did not amount to an abuse of power or other substantive constitutional violation." Rittenhouse v. DeKalb County, 764 F.2d 1451, 1453 (11th Cir. 1985). The Court of Appeals, however, disagreed with the District Court's assumption that a §1983 action required conduct constituting an abuse of power or a substantive constitutional violation.

Interpreting this Court's holding in Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), the Eleventh Circuit concluded that "merely negligent conduct can support a procedural due process claim if the state does not provide adequate postdeprivation remedies." Rittenhouse, supra at 1453. The Court of Appeals went on to reject petitioner's argument that her claim fell within the "established state procedure" exception in Parratt. Having found petitioner held no entitlement to predeprivation process, the Court then considered whether petitioner had an adequate postdeprivation remedy, in light of the county defendants' immunity, under Georgia law. The court read Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980), "as establishing that a state does not deny procedural due process simply by granting reasonable tort immunity to state entities and officials." Rittenhouse, supra

at 1458. Concluding the immunity DeKalb County and Stewart are afforded under Georgia law is neither arbitrary nor irrational, as it is not absolute but only shields the county and its officials from liability in the exercise of discretionary functions, the Court of Appeals found petitioner's state law remedy constitutionally adequate under Parratt, and affirmed the District Court's judgment.

SUMMARY OF ARGUMENT

The District Court correctly defined petitioner's claim against DeKalb County and its officer (Stewart) as arising in negligence, and thus failing to reach constitutional proportions sufficient to maintain a §1983 action. There is no constitutionally protected liberty or property interest in being free of injury caused by mere negligent conduct of state officials; however, even if such a protected interest did exist under the Fourteenth Amendment, Georgia law provides petitioner an adequate postdeprivation remedy under the Parratt analysis. This is not a prisoner case, or even a case involving action by state officials directed against petitioner in particular. Rather, it is a negligence claim alleging injury as a remote consequence of discretionary action by county employees. There are no special or important issues here deserving review by this Court. Both

the District Court and Court of Appeals correctly found petitioner's complaint insufficient under §1983.

REASONS FOR DENYING WRIT OF CERTIORARI

A. Parrat Did Not Hold That Any Citizen Who is Physically Injured or Whose Property is Damaged Because of the Negligence of a State Official May Bring an Action Under §1983.

The District Court correctly found that, in the absence of action constituting an abuse of governmental power, "a §1983 action does not arise 'merely because tortious injury results from action or inaction by state officers or employees.'" Rittenhouse, supra, 575 F.Supp. at 1174, citing from Hull v. City of Doraville, 678 F.2d. 582, 584 (5th Cir. 1981).

The essential element of a §1983 action is abuse by a state official of his official power. Monroe v. Pape, 365 U.S. 167, 172, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961). "Section 1983

focuses on '[m] isuse' of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law". Paul v. Davis, 424 U.S. 693, 717, 47 L.Ed.2d 405, 96 S.Ct. 1155, 1168 (1976). "Even intentional injuries inflicted by state officials must be 'state action' to implicate the due process guarantees, and must be 'under color of' state law in order to be actionable under §1983. In this area we have drawn a distinction between mere 'torts of state officials' and 'acts done 'under color' of law . . . which deprived a person of some right secured by the Constitution or laws of the United States'. (Screws v. United States, 325 U.S. 91, 109 1945) (plurality opinion of Douglas, J.) . . . "Parratt v. Taylor, 101 S.Ct. at 1921, n. 10 (Powell, J. concurring in the result). See also Screws. v. United States, supra, 325 U.S. at 134

(the Constitution protects the "right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power.") (Rutledge, J. concurring in the result).

In Paul v. Davis, supra, this Court, speaking through Justice Rehnquist, vigorously rejected the notion that traditional torts become constitutional violations when committed by state officers:

> If respondent's view is to prevail . . . it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official

> acting under 'color of law' establishing a violation of the Fourteenth Amendment.
>
> ... [R]espondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.
> Paul v. Davis, supra, 424 U.S. at 698-701, 96 S.Ct. at 1159-1160.

In Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979), the issue of whether an allegation of simple negligence is sufficient to state a §1983 claim was again before this Court. Although the Court disposed of

the case on other grounds, Justice Rehnquist stated:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.

Id. 443 U.S. at 196, 99 S.Ct. at 2695-2696.

As suggested by the Fourth Circuit Court of Appeals in Daniels v. Williams, 748 F.2d 229 (1984), certiorari granted, 105 S.Ct. 1168, Respondents believe that this Court's decisions in Parratt v. Taylor, supra and Hudson v. Palmer, 468 U.S. _____, _____ L.Ed.2d _____, 104 S.Ct. 3194 (1984), should be limited to their facts, and not construed so broadly as to include all claims in negligence committed by state officials. Both Parratt and Hudson involved prisoner claims for the deprivation of personal property

occurring within the context of a prison environment. Because the state had total control over such prisoner property, the Fourth Circuit in Daniels reasoned it consistent with the Fourteenth Amendment to require accountability by the state for any property loss.

Neither Parratt nor Hudson held that mere negligence will support a claim for relief under §1983. Indeed, Justice Powell noted, in his opinion concurring with the result, that "the Court passes over a threshold question – whether a negligent act by a state official . . . constitutes a deprivation of property for due process purposes." Parratt, supra, 451 U.S. at 547, 101 S.Ct. at 1919. Furthermore, Justice Powell went on to observe that in his opinion:

> A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most

> reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations. This is the view adopted by an overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States.
>
> . . . I would adopt the view that negligent official acts do not provide any basis for inquiries by federal courts into the existence, or procedural adequacy, of applicable state tort remedies.
>
> Id. 451 U.S. at 548, 551-552, 101 S.Ct. at 1919, 1921.

There is no claim of intentional tort here, the actions of DeKalb County employees were not directed toward petitioner Rittenhouse, nor did DeKalb County and Stewart have or exercise such control over petitioner's person and

property as exists in prison settings. Nothing contained in the language of §1983, its legislative history, or the opinions of this Court support the broad coverage petitioner would afford this civil rights statute. The District Court properly concluded that unintentional, but negligent, acts by state officials are not actionable under the due process clause.

B. A Claim for Procedural Due Process Deprivation Will Not Lie in the Absence of the Deprivation of a Substantive Right or Interest Created by the Constitution.

Section 1983 is not self-executing, in that the statute itself creates no substantive rights. McKinnis v. Mosely, 693 F.2d. 1054, 1057-58 (11th Cir. 1982). A public official is liable under §1983 only if he causes a plaintiff to be subjected to the deprivation of his constitutional rights.

Baker v. McCollan, supra, 443 U.S. at 190, 99 S.Ct. at 2692. If there has been no deprivation of a right, privilege or immunity secured by the Constitution and laws, then no right of procedural due process comes into play and the issue of whether negligence alone is sufficient under §1983 is immaterial.

Petitioner Rittenhouse contends a substantive constitutional right arises solely from an alleged violation of liberty and property rights under the Fourteenth Amendment. As Justice Blackmun observed in his concurring opinion in Baker, supra, "[t] he Court long has struggled to define the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Baker v. McCollan, supra, 443 U.S. at 147, 96 S.Ct. at 2696. In Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952), this Court held police conduct which "shocks the conscience" constitutes

a denial of due process. However, the Court has consistently rejected the notion that every state tort committed by a state officer is ipso facto converted into a violation of §1983. For example, within the context of prisoner medical treatment, a prisoner must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" in order to state a cognizable claim under §1983. Estelle v. Gambell, 429 U.S. 97, 106, 50 L.Ed.2d 251, 97 S.Ct. 285, 292 (1976).

Respondents believe the decisions of this Court would require a similar standard to be applied under the substantive due process clause of the Fourteenth Amendment, as has been applied in cases involving Eighth Amendment claims. There has been no finding or facts evidencing conduct, either negligent or intentional on the part of DeKalb County or Stewart which would constitute an abuse of

power or which "shocks the conscience", thus warranting the elevation of mere tortious conduct by state officials to the level of a constitutional deprivation under §1983.

The Eleventh Circuit Court of Appeals erred in examining the adequacy of petitioner's state law remedies, absent a showing by petitioner of a substantive right entitled to the procedural due process protection of the Fourteenth Amendment. The procedural guarantees of the Fourteenth Amendment are not invoked unless and until, as a result of state action, some constitutional right or status has been "distinctly altered or extinguished." Paul v. Davis, supra, 424 U.S. at 711, 96 S.Ct. at 1165. Petitioner has not shown any right under Georgia law which has been altered or extinquished as a result of respondents' acts. To the contrary, Georgia law expressly denies the right to maintain a cause of negligence against Respondents. The Court of

Appeals incorrectly concluded petitioner had satisfied the threshold inquiry under Parratt, as petitioner has not stated a claim for the deprivation of any right which would invoke the cloak of procedural due process protection.

C. Even if Mere Negligent Conduct Can Support Petitioner's Liberty or Property Deprivation Claim Under the Due Process Clause, Petitioner Has Available a Constitutionally Adequate Postdeprivation Remedy Under Georgia Law.

As previously stated, the Court of Appeals' affirmance of summary judgment in favor of DeKalb County and Stewart was based upon a finding that postdeprivation remedies available to petitioner under Georgia law are constitutionally adequate. Counties are generally immune from suit in negligence under Georgia's Constitution and

immunity law. O.C.G.A. §36-1-4; Article I, Section 2, Paragraph 9 of the Georgia Constitution of 1983. See also Miree v. United States, 242 Ga. 126, 249 S.E.2d 573 (1978).

> [W] here an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting, he is usually given immunity from liability to persons who may be injuried as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority, and without willfullness, malice or corruption. Hennessy v. Webb, 245 Ga. 329-330, 264 S.E.2d 878, 880 (1980).

Under the facts of this case, DeKalb County and Stewart would be immune from suit under Georgia law, based upon petitioner's claims in negligence.

In rejecting petitioner's claim that her constitutional right of procedural due process has been violated as the

result of Respondents' state law immunity, the Court of Appeals relied heavily upon this Court's holding in Martinez v. California, supra. As in the present case, Martinez involved a wrongful death action against state officials brought under §1983. The California Court of Appeals affirmed the district court's demurrer to the complaint, finding the laws of that State to provide a complete immunity defense. This Court upheld the constitutionality of California's immunity statute, as applied to defeat a tort claim under §1983, and found no federal claim arising under the due process clause.

> But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

> We have no difficulty in accepting California's conclusion that there 'is a rational relationship between the state's purposes and the statute." . . . We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law. Martinez v. California, supra, 444 U.S. at 282-283, 100 S.Ct. at 557-558.

The same rational relationship, between the State of Georgia's interest in controlling governmental tort liability and its immunity statute, exists here, and that interest is paramount to any discernible federal interest, unless that federal interest involves "protecting the individual citizen from state action that is wholly arbitrary or irrational." Id.

The Court of Appeals "readily" concluded that Georgia's immunity law is neither arbitrary nor irrational, as applied in this case to protect "the county and its officials from

liability for a purely discretionary function involving the necessity for and nature of procedures for handling emergency matters in the water department" and, as such, does not deny procedural due process. Rittenhouse, supra, at 1458. The "touchstone" of procedural due process is "protection of the individual against arbitrary action of government." (emphasis supplied), Wolff v. McDonnell, 418 U.S. 539, 558, 41 L.Ed.2d 935, 94 S.Ct. 2963, 2976 (1974).

Nothing in Parratt or Hudson finds to the contrary. In Parratt, this Court looked at state tort remedies available under Nebraska law to redress a taking of personal property by state officials within a prison context, and held those remedies to be adequate, although restricting the nature of damages recoverable. Due process does not require complete compensation for injury, or even compensation equivalent to that available under §1983.

Hudson, supra, 104 S.Ct. at 3204. See also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32, 57 L.Ed.2d 595, 98 S.Ct. 2620, 2638 n. 32 (1978).

The State of Georgia has determined to limit the liability of its public officials to intentional and bad faith actions, and has afforded those officers a complete defense to claims lying in negligence only. No decision of this Court has held that Congress intended to abrogate the common law or statutory immunity afforded public officials in the good faith exercise of their discretionary duties under state law. Assuming, for the purpose of this argument, that the Court of Appeals correctly read this Court's decision in Parratt to encompass petitioner's claim under §1983, then petitioner had an adequate state court remedy available under Parratt to adjudicate her claims.

CONCLUSION

There are no special or important issues here deserving review by this Court. Neither is there a need to hold the Court's decision, regarding grant or denial of certiorari, in abeyance until decisions are rendered in Daniels v. Williams, supra and Davidson v. O'Lone, 752 F.2d 817 (3rd Cir. 1984), certiorari granted _____ U.S. _____, 105 S.Ct. 2673 (1985). Both Daniels and Davidson are inmate cases and, as such, involve considerations not applicable to a claim alleging personal injury as a remote, or at least indirect, consequence of state discretionary acts effecting citizens in general. The District Court and Court of Appeals correctly found petitioner's claim to be insufficient under §1983. Respondents thus respectfully urge this

Court to deny the petition for writ of certiorari presently pending on behalf of Barbara Rittenhouse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I hereby certify that on the 7th day of January, 1986, three copies of the enclosed Response in Opposition to Petition for Writ of Certiorari were mailed first class, postage prepaid, to:

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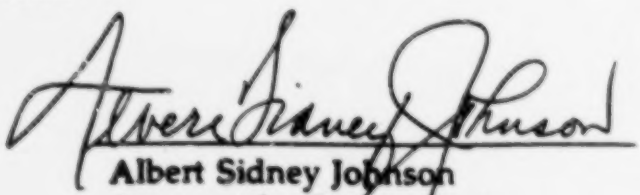
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I further certify that all parties required to be served have been served.



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